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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN PAPER INSTITUTE, INC.,
Petitioner,
v.
AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF KERR-McGEE CHEMICAL CORPORATION; SIMPSON PAPER COMPANY; UNITED TECHNOLOGIES CORPORATION, HAMILTON STANDARD DIVISION; AND COGENERATION SERVICES, INC.

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BRIEF AMICI CURIAE

INTEREST OF AMICI

Kerr-McGee Chemical Corporation ("Kerr-McGee"); Simpson Paper Company ("Simpson"); United Technologies Corporation, Hamilton Standard Division ("Hamilton Standard"); and Cogeneration Services, Inc. ("Cogeneration Services"), pursuant to Rule 36.2 of the Rules of this Court, respectfully submit this brief as amici curiae in support of petitioners Federal Energy Regulatory Commission ("FERC" or "the Commission") and the American Paper Institute, Inc. ("API"). Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court.

Amici are companies that have responded to and relied upon the incentives for development of innovative and

renewable resource technologies created by the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), one of the five parts of the National Energy Act. Congress enacted section 210 of PURPA, 16 U.S.C. § 824a-3, specifically to encourage cogeneration [1] and small power production,[2] energy production processes in which Amici share a common interest.

Kerr-McGee is a cogenerator at three of its chemical manufacturing plants in the Searles Valley area of San Bernardino County, California. The company's Argus/Trona and Westend facilities produce bulk chemicals basic to the world-wide agricultural industry. Kerr-McGee's manufacturing processes require substantial quantities of steam for process evaporation and drying. This process steam is derived in a cogeneration mode through topping cycles which produce the electrical and mechanical power requirements of the three plants.

Kerr-McGee's Argus/Trona cogeneration system generates approximately 40 megawatts of electric power, as well as some 7,000 horsepower of mechanical power. All

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[1] Cogeneration is the sequential production of "electricity energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." Federal Power Act § 3(18)(A) (as amended by § 201 of PURPA), 16 U.S.C. § 796(18)(A). Cogeneration increases the energy efficiency of industrial processes by enabling energy that formerly had been used to accomplish only one purpose to be used to accomplish two or more purposes. Simply put, more "work" is done per unit of energy input. If industries convert to cogeneration facilities on a wide enough basis, the contribution to the national effort to conserve nonrenewable fuels such as oil and natural gas will be enormous. *See* Wall St. J., Jan. 25, 1982, at 6, col. 2.

[2] A "small power production facility" produces electric energy "solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination" of these energy sources. Federal Power Act § 3(17)(A) (as amended by PURPA § 201), 16 U.S.C. § 796(17)(A). Small power producers, in other words, produce electricity entirely without the use of petroleum fuels.

of the electrical output of the Argus/Trona facility is currently used within the facility itself and, therefore, reduces the overall electric demand on Southern California Edison, its serving utility, by the amount generated. To advance the cogeneration goals of PURPA even further, however, Kerr-McGee has begun to expand the cogeneration capacity of the Argus/Trona facility to generate 6 megawatts of power over and above its needs, all of which is to be delivered to Southern California Edison for resale to its other customers. At Westend, Kerr-McGee generates, in addition to steam, an average of 12 megawatts of electricity for the facility's own use plus 3 to 5 megawatts of surplus power for use in the Southern California Edison system.[3]

Simpson is a diversified forest products and wood fiber manufacturing company with plants located principally on the West Coast.[4] Because steam is a major component of its pulp and paper manufacturing process and its wood drying process, Simpson has always had the capability to employ cogeneration technology to maximize the efficient use of energy at its plants. Before the enactment of PURPA, however, the lack of a ready market for, or of an economically adequate rate of return on, cogenerated electricity dissuaded Simpson from any substantial investment in cogeneration facilities. Following the enactment of section 210 of PURPA, Simpson has undertaken substantial commitments to new cogeneration facilities and has become a leader in business efforts to expand and modernize the industrial cogeneration facilities of this country.

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[3] On a straight useable output/heat input basis, the Argus/Trona cogeneration system has a thermal efficiency ratio of 86% as compared to the 34-37% efficiency ratio of a typical utility plant. The Westend system has a thermal efficiency ratio of 72%.

[4] Because Simpson is the wholly-owned subsidiary of Simpson Timber Co., the description that follows in text encompasses the activities of both these corporate entities.

Beginning with a pulp and paper mill in Anderson, California, Simpson is in various stages of planning, designing, and constructing six cogeneration facilities in California and Washington with a combined capacity of over 150 megawatts. The Anderson mill is a prime example of Simpson's efforts in this field. By June of 1983, the mill will convert from a conventional power system, with no electrical production capacity, to a natural gas-fired turbine/generator with a waste heat recovery boiler that is expected to generate an annual output of energy in excess of 260,000,000 kilowatt hours. Simpson has already contractually committed the Anderson mill to supply a major California utility, Pacific Gas & Electric Company, with 30 megawatts of capacity over the next thirty years. Simpson's efforts at Anderson are mirrored at its other cogeneration projects, and reflect Simpson's strong commitment to the cogeneration goals established by Congress in section 210 of PURPA.

Hamilton Standard is a long time designer, developer, and manufacturer of high technology products for the aerospace, automotive, and industrial markets. The company has recently expanded its activities to include the development of large (3 to 4 megawatt) wind turbine systems for the generation of electricity. Building from its existing technology base, Hamilton Standard has invested over $30 million in engineering design and in production facilities for the development of utility-scale wind turbine systems and has participated in the design and manufacture of two large wind turbine systems that are now operational. Hamilton Standard also has expanded its manufacturing facilities for wind turbine systems in order to provide wind energy systems to customers on a commercial basis. Hamilton Standard's strong commitment to wind energy derives from the market potential for wind energy systems in the United States fostered by PURPA and from a developing worldwide market for high technology energy products.

Cogeneration Services is a company that was founded to develop various types of alternative energy facilities. The company's objective is to own, operate, and finance cogeneration facilities in the forest product industry as well as small-scale hydroelectric projects. For example, through its ownership interest in another company, Cogeneration Services is currently engaged in the active development of small-scale hydroelectric sites in Colorado, Virginia, and the Northwest United States, among other areas of the country. In the cogeneration field, Cogeneration Services is working with a foreign boiler manufacturer to develop and finance the forest product industry's cogeneration capacity in the Northern Tier states. All of Cogeneration Services' vigorous efforts in the innovative and risky field of alternative energy were commenced in reliance on the economic incentives expressly provided by Congress in section 210 of PURPA to stimulate the development and expansion of cogeneration and small power production facilities. The work being done by Cogeneration Services in this field, however, is likely to be undermined, if not eliminated, if section 210 of PURPA is construed erroneously to diminish the incentives Congress intended to provide for alternative energy production.

Amici's efforts to develop and expand efficient electric generating capacity are threatened by the decision of the United States Court of Appeals for the District of Columbia Circuit vacating two key rules adopted by FERC to implement section 210 of PURPA. *American Electric Power Service Corp.* v. *FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *reprinted at* Pet. App. B-1 to B-34.[5] The Commission's full avoided cost rule required utilities to offer to buy power from qualified cogenerators and small power producers at the utilities' "full avoided

[5] The opinions below and the orders of the Commission are reproduced in Appendix B to petitioner API's petition for a writ of certiorari in No. 82-34. Citations to these opinions and orders are to the appropriate page(s) of that appendix ("Pet. App.").

cost"—the incremental cost the utility would have incurred to acquire or to generate for itself the electricity provided by the qualifying facility. 18 C.F.R. § 292.304(b)(2). This rule had set at a high incentive level the rate cogenerators and other qualifying facilities would receive for the power they produced. The court of appeals also struck down the Commission rule that required electric utilities to interconnect with qualifying cogeneration and small power production facilities.[6] 18 C.F.R. § 292.303(c)(1). In its place, the court construed PURPA to require parties seeking interconnection orders to undergo a complex evidentiary hearing at the Commission. Pet. App. B-20 to B-25. This difficult procedure creates a lengthy obstacle course for those who seek to interconnect their cogeneration or small power production facilities with a neighboring utility.

Amici are only several of the many diverse companies that have responded to Congress' call for increased electric energy production through the expansion of the nation's cogeneration and small power production facilities. At the time of the court of appeals' decision, FERC had already received certification applications for cogeneration and small power production projects designed to produce 2.5 million kilowatts.[7] By 1995 FERC expected that cogeneration and small electric power production projects would produce as much electric energy as 15 nuclear power plants.[8] The decision of the court of appeals, if affirmed, would jeopardize the above efforts, including the plans of Amici and many others similarly situated for the construction, modernization, and enlargement of cogeneration and small power production facilities, and would, in fact, generally threaten the continued growth of electric power generation through the use of

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[6] Qualifying cogeneration facilities and qualifying small power production facilities will be referred to collectively throughout this brief as "qualifying facilities" or "QF's."

[7] *See* Wall St. J., Jan. 25, 1982, at 6, col. 2.

renewable resources—including wind, biomass, waste, and solar energy—and through more efficient use of non-renewable oil and natural gas. The climate of uncertainty created by the court of appeals' decision has cast a shadow over the development of a fledgling but vital new energy industry.

SUMMARY OF ARGUMENT

Congress enacted section 210 of PURPA specifically to encourage cogeneration and small power production and to remove the historic barriers that had inhibited their development. The full avoided cost and interconnection rules promulgated by the Commission are essential to the accomplishment of these statutory goals. For this reason, the court of appeals' judgment vacating these two rules should be reversed and the rules reinstated with full force and effect.

The Commission's full avoided cost rule was a valid and adequately explicated exercise of the Commission's experience and expertise in the area of electric power ratemaking. The court of appeals' decision to vacate the rule failed to accord the agency that deference to which its expert judgment is entitled. Moreover, because the court of appeals lacked the requisite economic expertise, it failed to appreciate that full avoided cost encourages increased electric energy production by efficient qualifying facilities in place of more expensive and less efficient generation by utilities. By so restraining, or even reducing, utility rates, full avoided cost clearly satisfies the statutory mandate that the rate set by the Commission be "just and reasonable to the electric consumers of the electric utility." 16 U.S.C. § 824a-3(b). Finally, a close examination of the reasons for the Commission's adoption

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[8] *Id.*; *cf.* Salisbury, "Court Ruling May Unplug Small Power Plants," *Christian Science Monitor* 7 (Feb. 10, 1982) (stating that applications for 3,000 megawatts of capacity have been presented to FERC pursuant to the cogeneration program).

of a full avoided cost rule, as stated in its accompanying opinion, reveals that FERC gave full and thorough consideration to all of the relevant interests specified by Congress in section 210 of PURPA.

The Commission's interconnection rule is likewise fully within FERC's statutory authority and, in fact, is absolutely essential to the agency's ability to implement the mandate of section 210(a) of PURPA. The Commission properly interpreted section 210(a) of PURPA to authorize the agency to order interconnection between utilities and qualifying facilities as a concomitant of its power to compel sales and purchases in this field. The court of appeals' interpretation of section 210(e)(3)(B) to preclude the Commission from authorizing interconnection by rule in the area of cogeneration and small power production ignores the overriding statutory intent of Congress and fails to give adequate deference to the Commission's reasonable interpretation of its organic statute.

ARGUMENT

I. THE FULL AVOIDED COST RULE IS AUTHORIZED BY PURPA, FULLY CONSISTENT WITH THE ACT, AND ESSENTIAL IF THE POLICIES ADOPTED BY CONGRESS ARE TO BE IMPLEMENTED.

The court of appeals vacated the Commission regulation that required utilities to pay cogenerators and other eligible sellers the utilities' full avoided cost for purchases of power. The court of appeals held that the Commission had not adequately explained and justified its decision to set the compensation due cogenerators at full avoided cost rather than at some lower amount. Pet. App. B-18. As commentators have noted, the court of appeals did not reach a neutral conclusion, but rather "appeared to favor the issuance of a rule allowing cogenerators to charge a percentage of the utilities' avoided

cost."[9] The court of appeals' decision is flawed both legally and in the economic analysis that underlies its rationale for vacating the rule as inadequately explained.

More fundamentally, the court failed to apply a properly deferential standard of review, erroneously substituting its economic theories for the technical expertise of the Commission, and refusing to respect what is, both objectively and in context, an entirely adequate explanation of the Commission's rationale. As this Court stated in *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515 (1971), "the guidepost here is the Act's explicit commitment of the judgment as to what compensation is reasonably due, in this highly technical field, to the Commission." *Id.* at 528.[10] For these reasons, as amplified below, the opinion of the court of appeals should be reversed.

A. The Court of Appeals Did Not Give Proper Deference to FERC's Technical Expertise in the Establishment of Full Avoided Cost As the Appropriate Rate For Purchases of Power from Qualifying Generators.

The court of appeals found that FERC had not "adequately justified," "made clear," or "explained" how the full avoided cost rule is consistent with section 210(b) of PURPA. Finding the reasons given by FERC for adoption of the rule "inadequate," the court held that the Commission had failed "to meet its obligation to provide the public with the reasoned consideration, decision-making, and opinion which it is required to give." Pet. App. B-9 to B-12. Like beauty, what is an "adequate"

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[9] Strohl, Jr., "D.C. Circuit Decision Increases Uncertainty About Regulatory Treatment of Cogeneration," 14 *Nat. Resources L. Newsletter* 4, 5 (Spring 1982).

[10] The Court in *Gainesville Utilities*, 402 U.S. 515, also took pains to emphasize the Federal Power Act's injunction in section 313(b), 16 U.S.C. § 825*l*(b), that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* at 527.

explanation lies in the eye of the beholder. The court of appeals, distracted by its perception of the greater attractiveness of a percentage of avoided cost rate, as compared to a full avoided cost rate, asked far more of the Commission than the Administrative Procedure Act and the decisions of the Court require.

Section 210 of PURPA imposes no procedures for the promulgation of rules under its authority beyond the informal rulemaking procedures prescribed by the Administrative Procedure Act, 5 U.S.C. § 553.[11] The Commission's rules need therefore be accompanied only by "a concise general statement of their basis and purpose", and not, as would be the case were this an adjudication or formal rulemaking, by "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A). *See National Nutritional Foods Association* v. *Weinberger*, 512 F.2d 688, 701 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975); *Mobil Oil Corp.* v. *FPC*, 469 F.2d 130, 139-40 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

The "concise general statement of basis and purpose" required by the APA must, of course, be "reasoned." But "reasoned decisionmaking" does not consist of belabored explication of the facts and opinions that underlie an agency's choice of policy. Particularly in complex, technical, and uncertain areas and in the construction of newly enacted statutes, the requirement of reasoned decisionmaking is a mandate that the agency take a hard

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[11] Section 210 of PURPA directs FERC to provide "a reasonable opportunity for interested persons . . . to submit oral as well as written data, views and arguments" before issuing its cogeneration and small power production rules, but this requirement does not affect the applicability of the APA's informal rulemaking provisions. *See United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

and fair-minded look at the problems posed by the statute; show a willingness to listen and respond to constructive comments; and make an honest, unbiased effort to judge where the public interest lies.[12]

Although the court of appeals' opinion on the full avoided cost standard refers repeatedly to the inadequacy of FERC's explanation of the standard, the court below did not seriously attempt to conceal its belief that the agency's understanding of the problem was simply wrong—wrong because the Commission's considered judgment differed from the court's own conclusions on the proper rate that utilities ought to pay for power produced by cogenerators and small power producers. *See* Pet. App. B-12 to B-16. Amici believe, for reasons stated below, that the court of appeal's unsupported assertions about the nature of the market for QF-generated power and the effect on electric consumers of rates set at full avoided cost are manifestly incorrect. The question, however, is not whether the Commission or the court of appeals is correct about the nature of the market for QF-generated power, because Congress vested the Commission with the authority to make determinations of

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[12] Judge Leventhal, quoting from and using this Court's decision in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), as an example, captured both the requirement and its rationale:

> The parties raised a not insubstantial issue. The Court's response identified the context that the Commission had taken "massive evidence" with voluminous exhibits and various cost estimates in the record, and that the rates fixed, even with incentive increments, were within the range of cost estimates. "Its difficulties, while not minor, did not stem from any failure to seek answers." That single sentence is a capsule of the requirement of reasoned decisionmaking in the context of the novel and exigent problem of seeking to enhance natural gas supply in time of dire shortage while maintaining fairness to consumers.

American Pub. Gas Ass'n v. *FPC*, 567 F.2d 1016, 1030 (D.C. Cir. 1977) (quoting *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 318), *cert. denied*, 435 U.S. 907 (1978).

that type subject only to the limited scope of review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). As section 706(2)(A) states: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

This deference to Commission expertise is especially pronounced in the field of energy rate-setting:

> Congress has entrusted the regulation . . . to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." We are not obliged to examine each detail of the Commission's decision; if the "total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." . . . [The Commission] must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.

Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968) (citation omitted).

Respect for the FERC's judgment in this case is heightened by the one-year deadline imposed on FERC by Congress;[13] the fact that the rules represent the con-

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[13] *See Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1026 (D.C. Cir. 1978) ("[u]nless we are quite certain of our basis for doing so,

struction of a new statute by its implementing agency;[14] the recognition that "the breadth of agency discretion is, if anything, at its zenith when the action . . . relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies;"[15] the general rule that "when regulation features novelty in subject, technique, or both, the narrow scope of review established by conventional doctrine is further circumscribed;"[16] and the view that when, as here, administrative decisions "rest on judgment and prediction rather than pure factual determinations . . . . complete factual support for the Commission's ultimate conclusions is not required, since 'a forecast of the direction in which future public interest lies necessarily involves deduction based on the expert knowledge of the agency.'"[17]

Moreover, in the text of the statute, Congress empowered the Commission to adopt a full avoided cost rate, as well as a lesser rate: "No rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternate elec-

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we must be slow to overturn the Agency's judgment, whichever way it may incline, when Congress has required it to act quickly and decisively despite the lack of exact data").

[14] *See National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent"); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Dev. Co.* v. *Int'l Union of Elec., Radio and Mach. Workers*, 367 U.S. 396, 408 (1961).

[15] *Tennessee Gas Pipeline* v. *FERC*, 606 F.2d 1094, 1120 n.96 (D.C. Cir. 1979) (quoting *Niagara Mohawk Corp.* v. *FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)), *cert. denied*, 445 U.S. 920 (1980).

[16] *American Pub. Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1031 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

[17] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981) (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

tric energy." PURPA § 210(b), 16 U.S.C. § 824a-3(b). Because the full avoided cost rate is therefore presumptively within a zone of reasonableness established by Congress, the Commission's choice of a rate admittedly within that zone must be regarded as committed to its broad discretion.

In short, the circumstances surrounding FERC's adoption of the full avoided cost rule justified the greatest possible deference by the court of appeals. The court chose instead to substitute its views for those of FERC.

B. The Full Avoided Cost Rule is Just and Reasonable to Utility Customers, Who Will Reap Substantial Economic Benefits From the Commission's Decision to Require Utilities to Purchase Power from Qualifying Facilities at Full Avoided Cost.

The full avoided cost rule establishes a rate—the rate due cogenerators and small power producers for the electricity they produce and sell to a purchasing utility. The reason for the court of appeals' dissatisfaction with the full avoided cost standard stems from the court's belief that the rule, as explained by the Commission, failed to satisfy one prong of the statutory requirements: the mandate that the rate be "just and reasonable to the electric consumers of the electric utility." PURPA § 210(b)(1), 16 U.S.C. § 824a-3(b)(1). Viewing the just and reasonable standard as requiring a balancing of interests, the court concluded that the Commission had given all of the benefits of cogeneration and small power production to QF's and none to utility customers. In reaching its conclusion, the court developed its own economic analysis of the consequences of the full avoided cost standard upon utilities' customers. *See generally* Pet. App. B-12 to B-17. But the analysis is fundamentally flawed, as shall be demonstrated, and may be so flawed because the court of appeals lacked the Commission's basic understanding of the fundamental charac-

teristics of electric utility generation. The understanding that the Commission has developed through years of experience, and that the court of appeals lacks, is the foundation of the doctrine of deference to agency expertise. There is no better case for its application than the instant one.

Under the familiar statutory standard of "just and reasonable," the result reached, not the method employed, is determinative. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The impact of the rate order, not its theoretical basis, controls. If the "total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." *Id.* As we shall demonstrate, the effect of the Commission's full avoided cost rate is just and reasonable to electric consumers. In no way would electrical consumers be worse off under a full avoided cost rule and, in fact, they would likely be better off over time as cogeneration develops and takes hold.

What the court of appeals misapprehended is the relationship between the power produced by qualifying facilities and the utility generated power it replaces. A basic tenet of utility economics is that increased electric energy production by efficient nontraditional suppliers of electric energy will replace more expensive and less efficient incremental generation by utilities and will help to avoid or defer new generating capacity. The long term result of these effects will be to restrain or even reduce utility rates and to yield direct savings to utility customers.

The impact of cogeneration and small power production on utility rates is illustrated in Figure I, attached as Appendix A, which plots electricity generated (in megawatts) against its average cost plus rate of return (in cents per kilowatt hour (kwh)) for a hypothetical electric utility. Point A represents the utility's current generation at a particular point in time—2,500 megawatts at an average cost (plus rate of return) of 6 cents per

kwh. If one assumes—as AEP has argued would be the case—that cogeneration and small power production together will produce 20 percent of the utility's load, *see* Petitioner's Brief at 28 n.25, *American Electric Power Service Corp.* v. *FERC*, 675 F.2d 1226 (D.C. Cir. 1982) ("AEP's App. Brief"), the utility's power production will be reduced to 2000 megawatts, point B on the curve. More importantly, both the utility's marginal cost (which is virtually equivalent to the operating cost element of its full avoided cost) and its average cost plus return—*i.e.*, its rates—will be lowered to 4 cents per kwh. Indeed, because the utility's marginal or avoided cost has declined, the rates payable to QF's under the Commission's rules will also fall.

In short, the substitution of electricity generated by qualifying facilities for the utility's most expensive electricity reduces average costs and therefore the rates paid by utility customers. The numbers used are fictional, but the point of the example will be valid so long as a utility faces the common condition of the electric utility industry today: increasing marginal costs with increased power generation.[18] This assumption is supported by the Utilities' own discussion of the high cost of peak load generation before the court of appeals, *see* AEP's App.

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[18] The average price of electricity sold in the United States to end-users has climbed steadily and sharply since 1973, *see* Energy Information Adm'n, United States Dep't of Energy, *1980 Ann. Report to Congress* 170 (1981). The analysis holds true whether electricity is priced on an average cost or a marginal cost basis. Indeed, if marginal cost pricing (which is encouraged by PURPA) is employed, the savings will be much greater because marginal cost increases faster than average cost when costs are rising and decreases faster than average cost when costs are falling. The assumption essential to the analysis—that the marginal (and therefore the average) cost of electricity increases as more power is produced—holds true so long as utilities employ their lowest-cost capacity first. *See* Energy Information Adm'n, United States Dep't of Energy, *1977 Ann. Report to Congress* 205 (1978) ("1977 EIA Report").

Brief at 44-46, and is consistent with the practice of electric utilities to use lower cost capacity first, and to bring higher cost capacity on line only as needed, and then in order of increasing cost.[19]

A portion of the cost savings demonstrated above will be realized almost immediately, as utilities simply reduce usage of their most expensive peak load capacity.[20] Over the long term, the savings—and therefore the rate reductions—will be much greater. To the extent that QF's proliferate and produce power during peak periods as a result of the incentives provided by PURPA and the Commission's regulations, utility requirements for expensive and inefficient generating peak load capacity will be greatly reduced. This reduction in turn will lower both the high operating costs associated with peaking units[21] and the capital costs incurred to install new capacity, both of which are passed on to consumers in the rates charged by utilities. *See Re Cogeneration & Small Power Production*, 47 Pub. Util. Rep. 4th (PUR) 327, 332-33 (Maine Pub. Util. Comm'n July 9, 1982); *Re Cogeneration and Small Power Production*, No. U-6798, slip op. at 14-16 (Mich. Pub. Serv. Comm'n Aug. 27, 1982) (observing that generation and small power production facilities will "encourage the development of dispersed power generation which is clearly beneficial to all of a utility's ratepayers since it can delay the construction of larger, more costly generating facilities"); *Re Consolidated Edison Co.* 48 Pub. Util. Rep. 4th (PUR) 94, 109 (N.Y. Pub.

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[19] 1977 EIA Report, *supra* note 18, at 205-206.

[20] This capacity typically uses high cost gas or oil. *See* 1977 EIA Report, *supra* note 18, at 205.

[21] As the Utilities noted in their brief before the court of appeals, AEP's App. Brief at 46 n.41, peak units are most likely to run on scarce oil and natural gas. Replacement of utilities' peak load generation with more efficient QF's will thus have the additional benefit of conserving these more costly resources. The savings that ensue will reduce inflationary pressure on rates and will result in long run cost reductions to utilities and their customers.

Serv. Comm'n May 12, 1982) (requiring utility to purchase QF-generated power at full avoided cost "should lead to long-run savings for both utilities and ratepayers").[22]

Absent artificial barriers to entry,[23] cogenerators and small power producers will enter the market or increase their capacity as long as the full avoided cost of the utility in whose service area they are located (*i.e.*, as long as the price they receive) exceeds their marginal cost of production. As more cogeneration and small power producers come on line, however, the utility's full avoided cost will decline. Eventually, the market will reach equilibrium: when the marginal cost of constructing or expanding a qualifying facility equals the utility's avoided cost, the growth in qualifying facilities will stop. At that point, electric consumers will have reaped all of the economic benefits of cogeneration and small power production, because marginal qualifying facilities will be receiving no more than their costs plus a return (equal to the cost of money) on their investment. If—and only if—utility purchase rates are set at utility full avoided costs, consumer rates for electric power will be minimized over the long term.

These savings will obviously benefit utility customers, but reduced investment and lower costs are not popular with utilities. For reduced investment means a lower rate base, and a smaller rate base means smaller dollar "profits." For this reason, among others, utilities often resist policies that encourage cogeneration and small power pro-

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[22] The concern of the court of appeals that the full avoided cost standard may cause utilities with excess capacity to charge higher rates to the remaining customers is misplaced. In its Order, the Commission considered the question of excess capacity in adopting a definition of full avoided cost. *See* Pet. App. B-44 to B-45. The court also ignored the utilities' flexibility in decommissioning or retiring high cost or antiquated units so as to reduce excess capacity.

[23] For example, the inability to obtain interconnection without lengthy and expensive hearings. *See* section II.B.3, *infra*.

duction.[24] As the Court noted last term, Congress recognized, in adopting PURPA's remedial provisions, that "traditional electric utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities." *FERC* v. *Mississippi*, 50 U.S.L.W. 4566, 4568 (U.S. June 1, 1982). Congress did not make the mistake of equating the interests of utilities with the interests of their customers, however, and the Court should not do so. The interests of utility customers will be served by the provision of reliable electric power service at the lowest possible cost, as Congress intended, not by the discouragement of rate-reducing alternatives to utility generation.

In sum, expansion of QF capacity, which would be maximized by the full avoided cost rate, will allow utilities to (a) avoid new capacity, (b) eliminate or phase out less efficient, high-cost capacity, and (c) use inefficient capacity less often. All three effects reduce utility capital and operating costs, and thus consumer rates, from what they otherwise would be. Because of these benefits, the full avoided cost rule will reduce electric consumer rates to a greater degree (in the long run) than any other rate. The rule is manifestly just and reasonable.[25]

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[24] *See, e.g.*, Decision 91109, Investigation on the Commission's Own Motion Into the Electric Resource Plan and Alternatives of Pacific Gas and Electric Company, O.I.I No. 26 (Cal. Pub. Util. Comm'n December 19, 1979) (*"California PUC Decision 91109, OII-26"*). In that proceeding, the California P.U.C. found that, despite the recognized benefits of cogeneration, Pacific Gas and Electric had failed to staff itself adequately to pursue cogeneration, to plan for cogeneration, to approach large potential cogenerators, or in general to implement California P.U.C. policies designed to encourage cogeneration.

[25] The benefits of cogeneration and small power production, however, are not limited to rate reduction. First, small power production reduces the nation's dependence on oil and gas. *See generally FERC* v. *Mississippi*, 50 U.S.L.W. at 4568-4570 ("electricity consumed more than 25% of the total energy resources used in this country while supplying only 12% of the user demand for energy"). Cogeneration produces similar benefits because the process permits more useful work per barrel of oil or per cubic foot of natural gas. *See* note 1 *supra*. Second, alternative generating sources diversify

C. The Commission More Than Adequately Explained the Rationale for Its Decision in Full Compliance With the Administrative Procedure Act.

Measuring the Commission's explanation by the deferential standard required in an area of ratemaking consigned to the Commission's expertise under a novel regulatory statute, and placing aside the erroneous, theoretical objections that the court of appeals found with the economics of the full avoided costs standard, the Commission's Order should be upheld.

The Commission dealt extensively with the "split-the-savings" approach because a number of interested persons advanced this methodology as the principal alternative to a full avoided cost rule. After extensively discussing the split-the-savings approach, the Commission went on to consider the percentage of avoided cost approach—the method favored by the court of appeals on the basis of its misconceived economic theory. The Commission's discussion of percentage of avoided cost must be viewed in the context of its extensive preceding discussion concerning the split-the-savings approach and its discussion of incremental cost. *See* Pet. App. B-43 to B-45; B-63 to B-66.

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a utility's resource plan, and, therefore, increase system reliability. *California PUC Decision 91109, OII-26, supra* note 24, at 13. Third, because reserve margins are often established to replace an unplanned outage of the largest power plant on line, the development of many small power plants reduces reserve requirements by reducing the probability of a large outage. *Id.* at 14; *see also Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, 518 n.2 (1971). Fourth, the lead time required for cogeneration is several years less than that needed to plan and construct large central station nuclear power plants—2 to 5 years, as opposed to 10 to 15 years. Development of cogeneration facilities therefore allows greater flexibility in resource planning. *Id.* Fifth, because QF's are paid only for actual power generated, utility ratepayers bear none of the costs of unscheduled outages. *Id.* Finally, many forms of small power production (*e.g.*, geothermal, wind power, and solar power) are less polluting than the combustion processes employed in the utility peaking facilities they replace.

In reaching its decision to adopt a full avoided cost rate, the Commission focused on the statutory purpose and found that a percentage of avoided cost rate—the approach favored by the court of appeals—would provide less than the maximum permissible incentive to cogeneration and small power production. This focus, of course, fulfills the overall congressional design to encourage cogeneration and small power production. *FERC* v. *Mississippi*, 50 U.S.L.W. at 4568. But the Commission did not limit its focus solely to the consideration of the best way to implement this congressional purpose. Recognizing that Congress intended consumer interests to be considered, the Commission also examined the impact the competing rate approaches would have on electrical consumers and concluded that a full avoided cost rate would in no way harm the customers of utilities. The Commission reasoned that consumers of electricity would be kept whole because the price at which they purchased electricity would not rise yet they would enjoy the benefits of lesser dependence on imported oil and of more efficient use of energy attributable to cogeneration and small power production. Pet. App. B-65. As the Commission observed, these latter benefits are maximized because of—not in spite of—the full avoided cost rule and its provision of the maximum incentive to development of cogeneration. *See* Pet. App. at B-65 to B-66.

Contrary to the court of appeals' conclusions, therefore, the Commission did consider both the impact on consumers [26] and the public interest [27] in its decision and only

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[26] The Commission concluded that the rate reducing impact of a percentage savings approach would be "insignificant" per individual customer. The court of appeals took exception to this conclusion even though the statement appears obvious (even without a bow to the technical expertise of the agency). Utilities in large metropolitan areas serve hundreds of thousands, if not millions, of customers. If cogeneration sources ultimately represent 20 percent of the "supply" of the utility, the overall effect of an 80 percent avoided cost standard would be that at most 4 percent of the *incremental* cost of

then chose to strike a balance at the maximum incentive to cogeneration and small power production. Because the Commission expressly considered the impact of its Order on electric consumers, on the public interest, and on cogenerators and articulated its rationale for the selection of the maximum incentive rate of compensation within the zone of reasonableness permitted by Congress, the Commission's exercise of its discretion must be affirmed.

II. THE COURT OF APPEALS' RULING THAT PURPA DOES NOT AUTHORIZE THE COMMISSION TO ADOPT RULES REQUIRING UTILITIES TO INTERCONNECT WITH QUALIFYING FACILITIES IS ERRONEOUS AND SHOULD BE REVERSED.

FERC's cogeneration and small power production rules direct "any electric utility", with minor exceptions, to "make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart." 18 C.F.R. § 292.303(c)(1). The court of appeals struck this rule on the ground that section 210(e)(3)(B) of PURPA prohibited the Commission from authorizing interconnections between qualifying facilities and utilities except on a case-by-case basis in compliance with the procedures and criteria mandated by sections 210 and 212 of the FPA, 16 U.S.C. §§ 824i & 824k.

The court of appeals' conclusion as to the FERC's authority to issue the interconnection rule is erroneous. The rule is within FERC's statutory authority and, indeed, is absolutely essential if Congress' mandate—which respondents characterized before the court of appeals as a mandate for "the Commission [to] remove institutional barriers to efficient cogeneration" [28]—is to be carried out.

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generation would be "saved." Only this small amount would be spread among the very large class of ratepayers.

[27] These included decreased reliance on scarce fossil fuels, more efficient use of energy, and a higher growth rate for new technologies. *See* Pet. App. at B-65 to B-66.

[28] AEP's App. Brief at 47.

Even if section 210 of PURPA is arguably ambiguous as to FERC's authority to order interconnection by rule, the Commission's resolution of that ambiguity in favor of an interpretation that carries out the essential purposes of the statute is entitled to substantial deference.

A. On Its Face, the Commission's Authority to Issue Rules Requiring Purchases and Sales of Electricity Includes the Power to Mandate Interconnection.

All the parties agree that PURPA directs the FERC to issue rules requiring utilities to offer to sell electricity to, and buy electricity from, qualifying facilities. Because there can be no purchases or sales, as mandated by the Act and the rules, absent interconnection between utilities and qualifying facilities, the lower court's conclusion that FERC lacks authority under section 210(a) of PURPA to order interconnection by rule collapses of its own weight.[29] If the Commission is to issue rules that require utilities to transfer ownership of, and title to, electricity to QF's, the Commission must of necessity have the authority to adopt a companion rule that requires the physical connections necessary to permit the current to follow the title and flow between utilities and qualifying facilities. Without this essential authority, the "purchases" and "sales" that the Commission could order would involve transfer of ownership without transfer of power—a result totally at odds with the intent behind the statute.

To avoid so great a frustration of congressional intent, the Commission therefore construed its authority under section 210 of PURPA to encompass the power to order interconnection:

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[29] The Utilities themselves argued to the court of appeals that "purchase" and "sell" are to be defined literally. They contended that the Commission was "limited to issuing rules requiring utilities to engage in 'purchases,' 'sales,' and 'exchanges' as those words are understood in their ordinary and common meanings." AEP's App. Brief at 35. AEP argued that the word "sale", for example, meant "the transfer of ownership of and title to property from one person to another for a price." *Id.*

> [T]he obligation to interconnect with a qualifying facility is subsumed within the requirement of section 210(a) that electric utilities offer to sell electricity to and purchase electricity from qualifying facilities. . . . [T]o hold otherwise would mean that Congress intended to require that qualifying facilities go through the complex procedures [of sections 210 and 212 of the FPA] simply to gain interconnection, contrary to the mandate of section 210 of PURPA to encourage cogeneration and small power production.

Pet. App. at B-58; *see also* Pet. App. at B-60.

In light of the practical need to equip FERC with the power to order interconnections to effectuate congressional intent, the Commission's interpretation of section 210 of PURPA is the correct one as a matter of statutory interpretation. Consequently, the court of appeals' decision that the Commission lacks the essential authority to order interconnection by rule should be reversed.

B. Sections 210 and 212 of The Federal Power Act, as amended, Do Not Limit the Commission's Authority to Order Interconnection by Rule.

The court of appeals relied almost exclusively on section 210(e)(3)(B) of PURPA to support its conclusion that FERC is precluded from ordering interconnection except on a case-by-case basis, after an evidentiary hearing that must be conducted if the relevant utility so requests.

Even if this conclusion is considered a plausible interpretation of section 210 of PURPA, the court nevertheless erred by substituting its interpretation for the at least equally reasonable interpretation given the statute by the Commission. The court once again exceeded the proper scope of review by failing to accord the Commission's interpretation of its own statutory authority the appropriate degree of deference. This Court has very recently explained the appropriate role of the courts of appeal in

reviewing an agency's construction of its governing statute:

> [T]he task of the Court of Appeals [is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the [agency's] construction [is] "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction [is] the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

FEC v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981) (citations omitted); *accord Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Employing appropriate canons of statutory construction to resolve the purported conflict between subsections (a) and (e) of section 210 of PURPA, the court of appeals should have concluded that FERC's interpretation is not simply "sufficiently reasonable," but is compelling.

1. ***Sections 210 and 212 of the FPA Need Not Override Section 210 of PURPA to Play an Important Statutory Role.***

With a dearth of analysis, the court of appeals assumed that qualifying facilities under section 210 of PURPA were in fact subject to the substantial regulatory burdens imposed by sections 210 and 212 of the FPA. In contrast, the Commission, after a careful statutory analysis sensitive to the purposes behind the respective provisions, concluded that sections 210 and 212 of the FPA did not prevent the agency from promulgating a general interconnection rule designed to implement the specific mandate of section 210 of PURPA.

As explained at length by the Commission in its Rehearing Order, Congress intended sections 210 and 212 of the FPA to promote, not to impede, interconnection. *See* Pet. App. B-179 to B-182; *accord FERC* v. *Missis-*

sippi, 50 U.S.L.W. at 4568, 4570. To achieve that end, the conferees, altering the Bill in which these sections originated, "extended the right to apply for interconnection orders to certain cogenerators and small power producers." S. Rep. No. 1292, 95th Cong., 2d Sess. 90 (1978).[30] The conferees' statement is convincing evidence that Congress did not enact sections 210 and 212 of the FPA to permit utilities to frustrate cogeneration and small power production by compelling QF's to suffer time-consuming and expensive hearings on every interconnection, but rather intended that these sections, like section 210 of PURPA, be used to *advance* cogeneration and small power production. The meaning that the court below gave the "no exemption" clause of PURPA § 210 is flatly inconsistent with this intent.

The court of appeals also erroneously concluded that FERC's interpretation of the "no exemption clause" of section 210 of PURPA would render section 210(e)(3)(B) "meaningless surplusage." Pet. App. B-24. The conclusion was based on the court's rejection of the Commission's reasonable attempt to reconcile section 210(e)(3)(B) and section 210(a) of PURPA. Under the Commission's construction, Section 210(a) gives FERC the authority to order interconnection by rule when a qualifying facility sought to sell to and purchase from a utility in accordance with the mandate of Congress. Section 210(e)(3)(B), in turn, empowers FERC to order a qualifying facility to interconnect when the facility is *the target* of a utility's—or perhaps another qualifying facility's—efforts to interconnect. Pet. App. B-180 to B-182. With this sensible harmonization of the two provisions, the Commission as-

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[30] In fact, the primary purpose of sections 210 and 212 of the FPA was to remedy interconnection disputes among utilities in Texas and surrounding states. The sections were intended to permit interconnection of these utilities without subjecting them to the full panoply of federal regulation. *See* 123 Cong. Rec. S16,376 (daily ed. Oct. 5, 1977) (Col. 1, 2, & 3) (remarks of Sen. Johnston); *Id.* S16,377 (Col. 1, 2) (colloquy Sens. Bartlett and Johnston).

sured itself of the authority needed to accomplish Congress' directive to encourage the efforts of qualified facilities and ensured that, if the need arose, QF's could be the subjects of, and not merely applicants for, interconnection orders.[31]

2. *PURPA § 210 and FPA § 210 Orders are not Mutually Exclusive*

Sections 210 and 212 of the FPA authorize the Commission to issue adjudicative orders upon application, while section 210 of PURPA requires the agency to issue rules on its own motion.[32] This discrepancy is hardly unprecedented; many federal agencies are authorized to use both adjudication and rulemaking to implement regulatory policy. Congress may have enacted the "no exemption" clause of section 210(e)(3)(B) of PURPA and the "no limitation" clause of section 212 of the FPA to prevent FERC from limiting its choices and foreclosing action in either manner. To construe the "no exemption" clause to *require* the Commission to hold a full-dress hearing before mandating interconnection every time a utility refuses to interconnect with a QF voluntarily, however, is senseless and is at odds with the thrust of PURPA. In the oft-quoted words of this Court, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

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[31] For example, a QF located in an area served by a utility with low marginal (*e.g.*, avoided) costs might prefer to interconnect with a nearby utility having high marginal costs and a shortage of capacity. In such a case, the QF would want to participate in, and be subject to, an interconnection order requiring the nearby utility to interconnect to the QF and wheel power to the distant utility.

[32] The Court should note that, though the Commission rules direct utilities to interconnect with QF's, 18 C.F.R. § 292.303(c), QF's must bear the cost, 18 C.F.R. § 292.306. FERC left to state regulatory commissions the determination of what costs of interconnection are reasonable.

Congress was all too familiar, when it enacted PURPA, with the delay and expense of administration adjudication. The ambiguity of the statute should not be resolved in a way that denies the Commission necessary discretion and mandates a course of administrative action that is at best inconsistent with the felt and openly articulated concerns that motivated the law's framers.

3. *Requiring QF's to Obtain Case-by-Case Interconnection Orders Would Cause Expensive Delays that Would Severely Inhibit their Development, Contrary to Manifest Congressional Intent.*

A construction of PURPA that permits the Commission to mandate interconnection only by orders issued on a case-by-case basis after a full adjudicative hearing would be grossly inconsistent with the policy and purpose of the Act, which even the Utilities described before the court of appeals as "Congress' mandate that the Commission remove institutional barriers to efficient cogeneration." AEP's App. Brief at 47.

The choice between case-by-case adjudication and rulemaking is a choice between delay and expedition. This Court has therefore repeatedly refused to enforce statutory language to the effect that an agency may take certain action only after opportunity for a formal hearing or other case-by-case determination when this process would compel thousands of hearings or adjudications and seriously threaten an agency's ability to implement basic statutory goals. In 1964, for example, when faced with a challenge to the FPC's authority to regulate the pricing provisions of natural gas contracts by rule, eight Justices of the Supreme Court declined to compel the "vast proliferation of hearings" that would follow a decision allowing the Commission to proceed only on a case-by-case basis, even in the face of language in the Natural Gas Act requiring the Commission to set applications of the kind in issue "for hearing." *FPC* v. *Texaco*, 377 U.S. 33, 44 (1964). Their reasoning is instructive: "We see

no reason why under this statutory scheme the processes of regulation need to be so prolonged and so crippled." 377 U.S. at 44; *see Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 215 (1980); *E. I. DuPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132-33 (1977); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-21 (1973).

The need to avoid the delays of case-by-case adjudication is emphasized by FERC's heavy case load. As of September 1982, FERC had a backlog of approximately 13,000 undecided cases, ranging over the entire gamut of energy-related regulatory activities, including hydroelectric license review, gas pipeline rate determinations, and natural gas producer certification and abandonment applications.[33] To add to FERC's regulatory backlog an entirely new, and potentially overwhelming, class of adjudicatory cases is sheer judicial overkill, especially at a time when both the legislative and executive branches have spoken repeatedly of the need to streamline the regulatory process.

Adjudicatory hearings are not merely time-consuming; they are also prohibitively expensive for those involved. According to one study, "the approximate direct standard cost of full private party participation in" FERC hearings totals $1,500 per hearing day. Pierce, "The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy," 3 *Hastings L.J.* 1, 16 (1979). Appellate review, when sought, is estimated to cost an additional $12,000 per active private party per proceeding. *Id.* at 17-18.[34]

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[33] These figures are drawn from a chart entitled "Summary of Pending Workload" contained in FERC's Fiscal Year 1983 Congressional Budget Request at 7-8.

[34] Cogenerators and small power producers must bear these costs themselves. A utility, of course, incorporates these expenses into its rate base, adds an appropriate rate of return, and charges the resulting amount to its customers.

An interpretation that requires FERC to engage in case-by-case interconnection in small power producer and cogenerator cases, therefore, would gut the effectiveness of section 210 of PURPA by recreating precisely the kind of institutional barriers to cogeneration and small power production that Congress determined to strike down with the passage of the Act. For this inherently practical reason, the Act should be construed in a reasonable and sensible manner to permit the Commission to set a qualifying facility interconnection policy by rule.[35]

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed in its entirety and the rules vacated by that judgment reinstated.

Respectfully submitted,

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[35] The construction adopted by the Commission also comports with Congress' intent that FERC move expeditiously to establish a regulatory framework that encourages cogeneration and small power production. This intent is reflected by the language of Section 210 of PURPA that orders the FERC to promulgate QF rules within a year. Given its emphasis on the need to move rapidly to encourage the development of cogeneration and small power production, Congress could not possibly have intended to subject qualifying facilities to the delays of case-by-case adjudication.

APPENDIX A

Figure I